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Supreme Court of the United States

OCTOBER TERM, 1953

No. 627

WILLIAM B. COLLINS, Individually, and as Trustee for JEREMIAH F. COLLINS, VERA COLLINS, SISTER MARY ST. URSULA and CLARA COLLINS, *Petitioners,*

v.

ANN O'BRIEN, JEREMIAH SULLIVAN, Estate of CATHERINE SULLIVAN, Deceased, and Estate of SUSAN S. IRVING, Deceased, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AL. PHILIP KANE
CHARLES V. KOONS
WILLIAM A. KEHOE, JR.
1331 G Street, N. W.
Washington 5, D. C.,
Attorneys for Respondents.

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COUNTER-STATEMENT OF CASE

The United States Court of Appeals for the District of Columbia Circuit correctly summarized the facts of this case in the following language:

> "This case involves competing claims to the estate of James L. Collins, who died intestate. On September 2, 1947, the District Court entered an order authorizing service by publication on certain named persons as well as 'all the unknown heirs at law and next of kin of James L. Collins, deceased, and all other persons concerned' and commanding them to appear on

December 15, 1947 'to show cause why they have any interest in the said estate'. A Special Master was appointed by the District Court by order dated December 17, 1947. After holding hearings, the Special Master issued on August 19, 1948, a report which concluded that none of the then claimants (including appellant William B. Collins) had established any relaitonship to the deceased: the estate was declared escheated to the District of Columbia. Appellant excepted. *Before the District Court had ruled on the matter,* additional claimants moved to intervene. By order dated May 18, 1949 the District Court stayed the adoption of the Special Master's report and allowed the requested interventions. Appellees were allowed to intervene by orders dated April 19, 1950. Further hearings were held by the Special Master and on October 31, 1951, he issued his amended report which awarded the estate to the appelles." (R. 177-178) (Emphasis supplied).

It should also be stated that appellants, William B. Collins, et al. (petitioners here) excepted to the Special Master's Amended Report of October 31, 1951; that their exceptions, briefs and oral argument were heard and considered by District Judge Pine who found that the Special Master's findings of fact were "not clearly erroneous but amply supported" and that "the conclusions of law he reaches necessarily follow" (R. 73a). Judge Pine adopted, ratified and confirmed the original Report and Award of the Special Master as amended by the Amended Report and Award (R. 72a). The Court of Appeals affirmed (R. 179).

OPINIONS BELOW

A portion of the original Report and Award of the Special Master will be found beginning at page 79a of the record herein.

The Amended Report and Award of the Special Master will be found beginning at page 115 of the record herein.

The memorandum opinion of District Judge Pine dated July 2, 1952 will be found at page 73a of the record herein.

A portion of the Order Ratifying the Report and Award of the Special Master as Amended by the Amended Report and Award of the Special Master will be found at page 72a of the record herein.

The foregoing opinions are not otherwise reported.

The opinion of the United States Court of Appeals for the District of Columbia Circuit will be found beginning at page 177 of the record herein. It has not yet been officially reported.

In April 1950, at the time of the commencement of the hearings following respondents' intervention, the petitioners, William B. Collins, et al., filed in this Court a motion for leave to file a petition for writs of *prohibition* and *mandamus*. By this expedient they attempted to prevent the carrying on of the hearings. That motion, *sub nomine*, *Collins* v. *Letts* (Mis. No. 498, October 1949 Term) was denied on May 8, 1950; and said denial is reported at 339 U.S. 951.

STATUTES AND RULES INVOLVED

The principal statutes involved are the following sections of the District of Columbia Code, 1940 edition (the section numbers being unchanged in the 1951 edition) all of which are printed at pages 107 et seq. of the printed record herein:

Section 11-504
Section 13-108
Section 13-109
Section 13-111
Section 13-113
Section 18-711
Section 19-311

The following rules are also involved:

Rule 24 Federal Rules of Civil Procedure
Rule 53(e)(2) Federal Rules of Civil Procedure
Rule 81(a)(1) Federal Rules of Civil Procedure.

ARGUMENT

I. The petitioners erroneously ascribe to the simple order of publication the effect of a judgment, but:

(1) Such effect was not intended by the statutes under which the publication was had; and

(2) The terms of the order pursuant to which the publication was had show that the Court did not intend its published notice to have that effect.

The order, which authorized the plenary proceeding to determine who were the decedent's next of kin, contained these provisions:

> "3. That as to all parties who are returned 'not to be found' service by publication be had pursuant to Tit. 13, Section 108-113, both inclusive of said Code and the Rules of Court.
>
> "4. That *consideration of the prayers in said petition be reserved for further consideration of the Court after the completion of service upon the parties thereto.*" (R. 64a) (Emphasis supplied)

As the Court of Appeals said "The principal contention of appellant William B. Collins is that the order commanding all persons concerned to appear on December 15, 1947 had the effect of precluding intervention after that date". (R. 178)

Even a cursory examination of Sections 13-108 to 13-113 inclusive should show the error of this position. Section 13-108 describes the types of cases in which and the persons against whom publication may be substituted for personal service of process. Section 13-109 requires that publication can be had only after a personal summons shall have been issued and returned "not to be found". Section 13-111 provides that *no judgment may be taken,* following notice by publication unless the complainant, plaintiff, his agent or solicitor or attorney shall file an affidavit showing a mailing of the published notice or in lieu thereof

an affidavit that he has diligently attempted to locate the said party but has been unable to do so. It is only after such steps have been taken (and they were not taken in this case) that a judgment could be entered under Section 13-111. Section 13-113 provides for publication against "one who, if living, would be a proper party to any judicial proceeding" and it is unknown whether he be living or dead. This section contemplates that such a person may be proceeded against as if he were living but certain safeguards are erected:

(1) The representative of each party published against or one claiming under him is recognized as having the *right to intervene in the suit before final determination* thereof when notice has been given by publication as in the case of non-resident parties;

(2) a longer period of publication is prescribed, namely, twice a month for three months (which was the publication ordered in this case), as compared with a publication once a week for three weeks under Section 13-111; and

(3) no decree shall be passed against parties so published against unless the Court has been satisfied that *due diligence has been employed to ascertain such unknown heirs.*

So far as this case is concerned it is therefore immaterial whether the publication was ordered pursuant to Section 13-111 (in which event it would have been for the shorter period) because, in either event, evidence of diligence satisfactory to the Court *following the completion of publication* is essential before the rights of persons published against can be affected by the entry of judgment. No judgment under either section was taken prior to the entry by Judge Pine of the final judgment dated July 18, 1952 from which the petitioners appealed. Thus, all of the petitioners' loose statements regarding "collateral attacks" upon "final orders" and the "reopening of closed proceedings" are with-

out any foundation in law. The only thing which had ever been closed was the original hearing before the Special Master. The "proceeding" had been kept open by the petitioners' own exceptions to the Special Master's Report and Award.

This is adequately borne out by reference to the following parts of the record: Docket Entries (R. 111); Amended Report and Award of Special Master (R. 119-120); Memorandum Opinion and subsequent Order of District Judge Pine Ratifying the Report and Award of the Special Master as Amended by the Amended Report and Award of the Special Master (R. 72a, R. 73a); Opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 177-179).

II. **The proceedings in the District Court were in conformity with the statutory requirements of "due diligence".**

It has been demonstrated that Section 13-111 and 13-113 both require a showing of due diligence before a judgment can be taken against a person published against under those statutes.

The appellants' argument that all claimants who did not appear and answer by the return date set forth in the published notice were thereupon automatically barred does violence to two propositions established by the Court of Appeals in *Frazier* v. *Kutz*, 78 U.S. App. D.C. 241, 139 F. (2d) 380 (1943).

The first of these is:

> "In every case of this kind there is a presumption of law that deceased left heirs and this presumption obtains until the claimant by escheat overcomes the presumption by strong and convincing evidence". (p. 244)

The second proposition shows that the Court of Appeals understands that the published notice is merely process and that the hearing before the Special Master is part of the "due diligence" which is required before a judgment or

decree can be rendered against unknown parties. In this connection the Court said:

> "... the Probate Court should publish notice in one or more newspapers in the District of Columbia and if deceased was recently a resident of some other jurisdiction, in one or more newspapers in the latter addressed to all unknown claimants; after which the court should afford a full and fair hearing, and on the evidence adduced, determine the question whether the intestate died without relations entitled to take under the Statute of Descents. Less than this would not be due process". (p. 244)

The underlying factual situations in this case and in *Frazier* v. *Kutz* were identical. In both cases the decedent died without known heirs. In both cases the funeral directors, as creditors, filed petitions for letters of administration. Applying the principles of *Frazier* v. *Kutz* to the Collins case we see that the Court of Appeals has held that *after* the publication has been completed there should be a full and fair hearing to determine whether the deceased died intestate without relations entitled to take under the Statute of Descents.

III. **Rule 24 of the Federal Rules of Civil Procedure did not repeal Sections 13-108 to Section 13-113 of the District of Columbia Code** so far as they relate to probate cases because Rule 81(a)(1) of the said Federal Rules specifically provides that:

> "They (the rules) do not apply to probate, adoption or lunacy proceedings in the United States District Court for the District of Columbia except as to appeals therein."

It is therefore apparent that the petitioners' argument in this regard is frivolous and without merit.

Under the governing statute, the respondents, since they were intervening as of right and were claiming a fund held by officers of the Court (administrators), could intervene

at any time before final disposition of the case. Even if the intervention was not "of right", the Court in its discretion could permit the intervention. (Rule 24 Federal Rules of Civil Procedure)

IV. **The petitioners were never placed under any "stay order" as alleged** in the petition for certiorari, nor were they excluded from any hearings by a void order of intervention as asserted (Petition p. 9).

In this connection the following excerpt from the Amended Report and Award of the Special Master is particularly significant:

> "As stated above, Rosa Grubbs, also known as Rosa Collins filed exceptions to the first Report and Award herein which denied her claim but, although given notice of the hearings before the Special Master after the case was reopened, she failed to appear or give any further testimony. The other exceptants, William B. Collins, et al., were also given notice of the reopened hearings but their then attorney of record, Percy H. Russell, National Press Building, Washington, D. C., appeared at the first reopened hearing on April 26, 1950 before the Special Master and stated that he had been requested by William B. Collins not to proceed on behalf of William B. Collins, et al. and that he had been further requested to withdraw the cross-interrogatories filed on their behalf on March 27, 1950 which had already been propounded to a witness, Cornelius Collins, by the United States Consul at Cork, Ireland. Mr. Russell then withdrew his appearance for William B. Collins, et al., after due notice to them, and said claimants took no further action in the case as far as the hearings before the Special Master were concerned." (R. 124-125)

This statement of the Special Master, when viewed in the light of the fact that *Collins* v. *Letts* (No. 498 Misc., October Term 1949) was filed in this Court on April 18, 1950, makes it clearly apparent that the petitioners were not excluded from but, on the contrary, boycotted the hearings

before the Special Master. The record then shows that William B. Collins, et al. did present their exceptions to the Amended Report and Award of the Special Master and that Judge Pine "after full consideration . . . of the exceptions and supporting briefs filed by the several exceptants . . . and after full argument" determined that "the findings of fact made by the Special Master are amply supported by the record herein and that the conclusions of law reached by the Special Master necessarily follow from the facts" (R. 72a) and adopted, ratified and confirmed the original Report and Award of the Special Master as amended by the Amended Report and Award.

From the memorandum opinion (R. 73a) and order (R. 72a) signed by Judge Pine it is apparent that the petitioners had their full day in Court.

V. The petitioners are clearly without substantial interest in this estate.

The petition for certiorari and the record, when considered together, clearly demonstrate that the petitioners are not entitled to any portion of the estate of James L. Collins, deceased. Even if their claims, which are based entirely on wishful thinking and are not supported by any substantial evidence whatever, (*Vide* R. 6a et seq.) were fully established they would be first cousins once removed (or second cousins) of the decedent. Since the respondents have been found, upon elaborate evidence supported by certified documents (*Vide* R. 137 et seq.; Exhibit A, R. 175, Tr. 3288), to be first cousins, it should be clear that the petitioners can have no interest in the estate because under Section 18-711 of the District of Columbia Code (R. 109) there is no representation among collaterals in the distribution of intestate decedents' personal estates.

VI. The petitioners' claim of denial of due process is ill-founded.

As shown above, the petitioners' loose statements about "final orders", "collateral attacks", "reopening cases",

"stay orders", "exclusion from hearings" and all of the other bases for their claims of denial of due process have no foundation outside of the vivid imagination of William B. Collins.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Al. Philip Kane
Charles V. Koons
William A. Kehoe, Jr.
1331 G Street, N. W.
Washington 5, D. C.,
Attorneys for Respondents.

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Respondents

PETITIONERS' REPLY BRIEF

William B. Collins,
Counsel for Petitioners,

Robert L. Collins,
Of Counsel.